No. 95-566

In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

JAMES ALLEN EGELHOFF,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Montana

JOINT APPENDIX

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NOTICE OF LOCATION OF LOWER COURT OPINIONS AND ORDERS NOT REPRINTED IN THE JOINT APPENDIX

The following opinion and jury instructions have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

RELEVANT DOCKET ENTRIES FOR MONTANA V. EGELHOFF:

Date	Doc. No.	Proceeding
7/31/92	02	Motion for Leave to File Information Direct and Supporting Affidavit
7/31/92	03	Order Granting Leave to File Information Direct
7/31/92	04	Information
4/7/93	163	Jury Instruction No. 1
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5/25/93	170	State's Brief in Opposition of Motion For New Trial
6/18/93	174	Denial of Motion For New Trial
6/18/93	175	Judgment (Defendant sentenced to 40 years in the Montana State Prison on each count of deliberate homicide. In addition, Defendant sentenced to two years in the Prison on each count for using a firearm in the commission of each offense.)
Trial Transcript, pp. 1158-59		Defendant's objection at trial to Jury Instruction No. 11.

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MONTANA NINETEENTH JUDICIAL
DISTRICT COURT, LINCOLN COUNTY

THE STATE OF MONTANA, Plaintiff, vs. JAMES ALLEN EGELHOFF, Defendant.	)	No. DC 92-60 MOTION FOR LEAVE TO FILE INFORMATION DIRECT (Filed July 31, 1992)

COMES NOW, SCOTT B. SPENCER, County Attorney in and for Lincoln County, Montana, and hereby asks leave of the Court to file an Information charging the offense of **DELIBERATE HOMICIDE, two counts,** against James Allen Egelhoff.

This request is based upon the Affidavit annexed hereto.

DATED this 30th day of July, 1992.

/s/ Scott Spencer
Scott B. Spencer
County Attorney

STATE OF MONTANA)
) ss: AFFIDAVIT
County of Lincoln)

SCOTT B. SPENCER, being first duly sworn, deposes and says:

1. Your Affiant is the duly appointed, qualified and acting County Attorney for Lincoln County, Montana, and in such capacity, your Affiant has learned the information contained in this Affidavit;

2. At approximately just before midnight on July 12, 1992, Becky Garrison (hereinafter "Garrison") was driving on highway 2 west of Troy near Yaak Hill. Kerry Tunison Jr (hereinafter "Tunison") and Garrison's daughter were in the car. They came across a spot on the road on the top of Yaak Hill where it appeared a car hit the guardrail. They saw a blue Ford Galaxy leaving the area of the guardrail. The guardrail was damaged. Car parts were laying on the roadway. They followed the 1974 Ford Galaxy down the road. It was driving about 5 to 10 mph. The Ford Galaxy was weaving down the road. Becky Garrison suspected that the driver of the vehicle was intoxicated due to the way that the car was driving and due to what they had seen as to the guardrail. Garrison and Tunison looked at the license plate number on the Ford Galaxy and got a description of the Ford Galaxy. Tunison told Sheriff's deputies that the Ford Galaxy stopped in the driving lane of the highway across from the Cornwall residence. Garrison pulled around the Ford Galaxy and into the driveway of the Cornwall residence to call 9-1-1.

3. Garrison went into the residence to call 911. Tunison ran toward the Ford Galaxy to see if the people in the car needed assistance. As Tunison approached the Ford Galaxy, the car suddenly accelerated past him. He had to dodge out of the way of the car. It went by him and went into a ditch. He could not tell how many people were in the car or who was driving. Tunison heard sounds as if the car was trying to get out of the ditch.

4. Garrison and Tunison ran to the Ford Galaxy. Defendant James Allen Egelhoff (hereinafter "Egelhoff") was laying down in the back of the Ford Galaxy. A female identified as Roberta Jean Pavola (hereinafter "Pavola") was on the passenger side of the front seat in a fetal position. A male identified as John Darrell Christenson (hereinafter "Christenson") was laying on the front seat with his head on the driver's side of the vehicle. His feet were crossed and on the passenger side of the vehicle. Pavola was laying on top of his legs. Tunison said no one got out of the Ford Galaxy. Tunison went up to the Ford Galaxy. Egelhoff was yelling "Oh, my hands, my hands."

5. Officer Gary McVay of the Lincoln County Sheriff's office was summoned, as well as an ambulance crew. Garrison, Tunison and other passerbys removed Pavola and Christenson from the vehicle. CPR was administered to Pavola and Christenson. When the ambulance arrived, Egelhoff was still in the Ford Galaxy. McVay observed a pistol holster on Egelhoff's belt. The ambulance crew first administered to Christenson and Pavola. Christenson and Pavola were transported to St. John's Lutheran Hospital in Libby. Egelhoff was also transported to the hospital. At the hospital, it was determined that Christenson and Pavola had been shot in the head. The bullet wounds

suggested a weapon of a caliber somewhere between a .38 and a .22. Egelhoff no longer had the holster on his belt. The holster was not at the hospital and not in the ambulance. McVay also saw a woman's purse laying in the car.

6. Christenson was shot in the back of the head on the right side. Pavola was shot in the left temple. Cause of death for each person was the gunshot wound.

7. Detective Doug Johnson was summoned to the scene, which is between milepost 4 and mile post 5 between the top of the Yaak Hill and the junction of the Yaak Highway. He saw blood in the Ford Galaxy. He also saw what appeared to be a .38 cal 2" barrel pistol on the floor of the Ford Galaxy. The pistol and blood were in plain view from outside of the Ford Galaxy.

8. The Ford Galaxy is registered to Christenson. Christenson has two sets of license plated [sic] registered to him, one for a car and one for a truck. The truck plates are on the car.

9. Detectives for Lincoln County Sheriff's Office later found blue paint on the guardrail. The Ford Galaxy was impounded and stored. The left fender and front grill of the Ford Galaxy is severely crumbled.

10. The 1974 Ford Galaxy station wagon was searched pursuant to search warrant. A .38 caliber Colt revolver was found on the floor board to the station wagon. Two bullets had been fired from the pistol. The window on the passenger side of the vehicle had been destroyed. Window fragments were found on the floor board of the front seat of the station wagon. Blood stains

were found on the car seat and on the passenger door to the station wagon.

11. Egelhoff was interviewed at the hospital. Egelhoff stated that an unidentified fourth person killed Pavola and Christenson. Egelhoff stated that he fled from the car after it came to rest on the top of the Yaak Hill prior to any shots being fired. He stated he fled up a hill side. He stated that he heard two shots fired. Garrison observed the car from the entire time it came to rest until ambulance personnel removed Egelhoff from the blue Ford Galaxy to transport him to St. John's Lutheran Hospital. Egelhoff did not leave the car at any time nor was any fourth person present. Members of the Sheriff's Office investigated the hill side near to where the car came to rest. There is no sign whatsoever that any party was on the hill side.

12. Members of the Lincoln County Sheriff's Department investigated Highway 2 from the top of Yaak Hill back toward Troy several miles to the KOA Campground near the Kootenai River. Officers investigated what is known as old Highway 2 to the KOA Campground, where old Highway 2 joins the existing Highway 2, to the bridge over the Kootenai River by Troy. They discovered on the right side of the highway as a person drives toward Idaho numerous locations where a vehicle swerved off the road into the barrow [sic] pit. The barrow pit is often referred to as the ditch. They found a location where a vehicle swerved off the barrow pit, appeared to back up in the dirt, and go back on to the highway. There is clover in that area. Officers discovered on the rear bumper of the blue Ford Galaxy clover and dirt.

13. Dr. Griffith was driving on Highway 2 West of Troy shortly after 11:00 P.M. on July 12, 1992 when he saw an older model blue car in the area of the KOA campgrounds. He saw the car swerve several times and then go into the barrow pit. Griffith stopped to render assistance. Three people were in the car. One, and possibly two, people yelled at Griffith to stay away. Griffith and others who stopped to render assistance became frightened and left. Leslie Love was one who stopped at the scene. Love could see only one person in the car. The person in the car was revving up the engine trying to get out of the ditch. Eventually, the vehicle got out of the ditch. Love followed the car about 1/4 mile. The car swerved from side to side and eventually went into the ditch again. Love passed the car. Love stopped at Stateline and called the Sheriff to report the driving of the car. Officers also discovered a location on old Highway 2 near to a cedar mill where a vehicle swerved off the road. There is colored glass, which apparently is of the type from the window of the blue Ford Galaxy, scattered along that location where the car went off of the road. People who were working at the mill stated that a car drove by slowly about midnight on or between July 12 and July 13.

14. Officers also found on old Highway 2, approximately .9 mile from Troy and on a place where the road is ascending a hill, a pile of glass in the middle of the road. This glass is granulated and appears of the same type as in the window of the blue Ford Galaxy. Also found mixed in with the glass were what appeared to be three bone fragments. The gun shot wound to Pavola exited her skull. Bone fragments would be scattered as a result of the exit wound.

15. Pavola, Christenson, and Defendant were seen drinking together in Troy on July 12, 1992. They were drinking at the Yaak Apartments in Troy. The three left together in the Ford station wagon about dark or shortly thereafter. Darkness falls about 10:30 P.M.

16. Several acquaintances of Defendant stated he carries a .38 caliber snub-nose revolver in a holster on his hip. A Daryl Langton stated that Defendant had the pistol in the early evening of July 12, 1992.

Further your Affiant sayeth naught.

/s/ Scott Spencer
Scott B. Spencer

SUBSCRIBED AND SWORN to before me this 31 day of July, 1992.

(SEAL)

/s/ Debra S. Kambel
Notary Public for the State
Montana, residing at Libby
My Commission expires 8-27-94

JUDGE ROBERT S. KELLER

MONTANA NINETEENTH JUDICIAL DISTRICT
COURT, LINCOLN COUNTY

THE STATE OF MONTANA, Plaintiff, vs. JAMES ALLEN EGELHOFF, Defendant.	)	No. DC-92-60 ORDER GRANTING LEAVE TO FILE INFORMATION DIRECT (Filed July 31, 1992)

Motion for Leave to File Information Direct having been made, and good cause appearing in the Affidavit as annexed thereto,

IT IS HEREBY ORDERED:

That SCOTT B. SPENCER, County Attorney in and for Lincoln County, Montana, is granted permission to file an Information against the above named Defendant.

DATED this 31st day of July, 1992.

/s/ Robert S. Keller
ROBERT S. KELLER
District Judge

Copy: County Attorney
7/31/92 bn

SCOTT B. SPENCER
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(406) 293-2717

Attorney for Plaintiff

MONTANA NINETEENTH JUDICIAL DISTRICT
COURT, LINCOLN COUNTY

THE STATE OF MONTANA,	)	No. DC-92-60
	)	INFORMATION
Plaintiff,	)	(Filed July 31, 1992)
vs.	)	
JAMES ALLEN EGELHOFF,	)	
Defendant.	)	

SCOTT B. SPENCER, County Attorney for Lincoln County, Montana, charges that late on July 12, 1992, or the early morning hours of July 13, 1992, at Lincoln County, Montana, the above named Defendant committed the following offenses:

COUNT I

DELIBERATE HOMICIDE, a felony, in violation of §45-5-102, M.C.A.

The facts constituting the offense are that Defendant purposely or knowingly caused the death of another human being. Defendant killed John Darrell Christenson by shooting him in the head. The offense occurred in Lincoln County, Montana.

COUNT II

DELIBERATE HOMICIDE, a felony, in violation of §45-5-102, M.C.A.

The facts constituting the offense are that Defendant purposely or knowingly caused the death of another human being. Defendant killed Roberta Jean Pavola by shooting her in the head. The offense occurred in Lincoln County, Montana.

Conviction of each count of **DELIBERATE HOMICIDE,** a felony, is punishable by imprisonment in the Montana State Prison for 10 to 100 years or life, or death.

A list of possible witnesses for the State now known to the prosecution are as follows:

Don Litch, 14460 Bull Lake Road, Troy, MT
Steve Cook, Troy, MT
Leslie Dale Love, Jr., Box 311, Bonners Ferry, ID
Rick Flesher, 1462 E. 5th Street, Libby, MT
James Cosgriff, 775 Sheldon Flats, Libby, MT
Stan Stroisch, 115 Eid Lane, Kalispell, MT
Gary Lee Tores, PO Box 285, Troy, MT
Karen Helmrick, 180 Bighorn Way, Troy, MT
James William Darrington, PO Box 1086, Troy, MT
Dr. Griffith, 845 Hwy 2 West, Libby, MT
Robert Deans, Butte, MT
Dawn Thrasher,
Charlie Muchmore, Troy Police Department, Troy, MT
Bob Garrison,
Sue Close, 316 Yaak Avenue, Apt #2, Troy, MT
Kathy Seter, 316 Yaak Avenue, Troy, MT
Donn Ross, #10 Fairview Heights, Troy, MT
Carolyn Ross, #10 Fairview Heights, Troy, MT
Daryl Langton, 3436 Bitteroot, Billings, MT
Wade Olson, PO Box 10, Troy, MT

Kerry Tunison, PO Box 146, Troy, MT
Klint Gassett, Lincoln County Sheriff's Office, Libby, MT
Craig Martin, Lincoln County Sheriff's Office, Libby, MT
Gary McVay, Lincoln County Sheriff's Office, Libby, MT
Don Bernall, Lincoln County Sheriff's Office, Libby, MT
Doug Johnson, Lincoln County Sheriff's Office, Libby, MT
Jim Sweet, Lincoln County Sheriff's Office, Libby, MT
Steve Hurtig, Lincoln County Sheriff's Office, Libby, MT
Dr. Maloney, Prompt Care, Libby, MT
Dulci Wallace, O'Brien Creek, Troy, MT
Junior Peterson, Troy, MT
Charles Welch, Troy, MT
Dino Shelmerdine, Troy, MT
Mary Heim, Troy, MT
Randy Wiza, St. John's Hospital, Libby, MT
Unidentified Lab Technician, Crime Lab, Missoula, MT
Unidentified Lab Technician, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C.
Unidentified Lab Technician, Federal Bureau of Investigation, Washington, D.C.

DATED this 31 day of July, 1992.

/s/ Scott Spencer
Scott B. Spencer
County Attorney

Copies: Defendant
Sheriff
Adult P&P
MT State Prison (Cert.)
State Board of Pardons (Cert.)
6-18-93 np

INSTRUCTION NO. 1

Ladies and Gentlemen of the Jury:

It is my duty to instruct the jury on the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you.

No remark I make and no instruction I give is intended to express my opinion as to the facts in this case or what verdict you should return.

You should take the law in this case from my instructions alone. You should not accept anyone else's version as to what the law is in this case. You should not decide this case contrary to these instructions, even though you might believe the law ought to be otherwise. Counsel, however, may comment and argue to the jury upon the law as given in these instructions. If, in these instructions, any rule, direction or idea is stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. You are not to single out any sentence or any individual point or instruction, and ignore the others. You are to consider all of the instructions as a whole, and are to regard each in the light of all the others. The order in which the instructions are given has no significance as to their relative importance.

The function of the jury is to decide the issues of fact resulting from the charges filed in this Court by the State and perform this duty uninfluenced by passion or prejudice. You must not be biased against a defendant because he has been arrested for this offense, or because charges have been filed against him, or because he has been brought before the Court to stand trial. None of these

facts is evidence of guilt, and you are not permitted to infer or to speculate from any or all of them that the defendant is more likely to be guilty than innocent.

You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the State and the defendant have a right to demand, and they do demand and expect, that you will act conscientiously and dispassionately in considering and weighing the evidence and applying the law of the case.

GIVEN: /s/ Robert S. Keller
District Judge

AMY N. GUTH
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Lincoln County Public Defender
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Libby, Montana 59923
(406) 293-7781
Attorneys for the Defendant

MONTANA NINETEENTH JUDICIAL DISTRICT COURT, LINCOLN COUNTY

* * * *

THE STATE OF MONTANA, Plaintiff,	)	Cause No. DC 92-60
vs.	)	MOTION FOR NEW TRIAL
JAMES ALLEN EGELHOFF, Defendant.	)	(Filed May 7, 1993)

* * * *

COMES NOW, the Defendant, James Allen Egelhoff, through his attorneys, and moves the Court to grant him a new trial, pursuant to {[sic] 46-16-702, M.C.A.

The grounds for the request for new trial are as follows:

1. There was not substantial credible evidence upon which the jury could have found the defendant guilty of the two charges of deliberate homicide, committed in violation of {45-5-102, M.C.A.

As previously argued at the conclusion of the prosecution's case and at the conclusion of the trial, there simply was not substantial credible evidence that defendant shot and killed the two decedents. There was no

proof that the bullets were fired from the gun found in the car, no proof that defendant handled that gun, no proof that he was ever in the front seat of the car. In addition, there was proof that he was "passed out" and could not have driven the car. There was also proof by an eye witness that there was a person other than defendant driving the car at the base of "Yaak Hill," when it was observed by Dr. Griffith and Leslie Love. The only proof offered by the State was that defendant was in the car when it was found and that the only two occupants were dead. However, there was no proof that a fourth person might not have exited the car.

This failure of proof, coupled with the erroneous instruction on the legal effect of voluntary intoxication as stated below, must give rise to a new trial for lack of substantial credible evidence of defendant's guilt beyond a reasonable doubt.

2. It is [sic] was reversible error for the trial court to have allowed a witness, Becky Garrison, to give an opinion regarding the manner in which the offense was committed. Ms. Garrison was asked by the prosecutor if she had such an opinion. This question was objected to, for the reason that the witness was not qualified to give such an opinion. The defense also objected on the grounds of surprise, for the reason that the statement of Garrison had not been supplied to the defense, despite the requests that had been made for discovery and this Court's Order that the State provide all such statements to the defense. The State certainly knew what Garrison was going to say when she was asked the question, and ought to have provided this statement to defense prior to questioning

her in court, before the jury. The Court allowed the witness to answer, subject to cross-examination of the defense. The witness then testified that she had the opinion that the defendant had been driving the car with the stick which was found by Garrison at the scene. This opinion tends to explain why the defendant had little blood on his clothing and the jury was persuaded by that testimony in finding the defendant guilty.

3. The jury ought not to have been instructed that voluntary intoxication is not a defense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense.

The State offered as an instruction to the jury a statement of the statutory language from {45-2-203, M.C.A., [sic] This instruction was objected to by the defense for the reasons that it was misleading to the jury and for the reason that the statute was unconstitutional in that it had the effect of shifting the burden of proof to the defense.

Approximately one hour after his apprehension at the final accident scene, defendant's blood was taken at the hospital and tested. The blood alcohol level was .36%, or more than three times the legal limit for intoxication according to the Montana motor vehicle operation laws. Defendant proved this amount in order to explain his inability to remember the events of the evening (an alcohol induced "Blackout" as testified to by defendant and his physician, Dr. Clyde Knecht). It was also offered to explain that defendant would have been incapable of driving the car over the route which it is believed the car traveled, especially up the "Yaak Hill," or to perform

other acts requiring physical coordination. It was NOT offered as a defense either through testimony or during the closing argument. In fact, defendant's counsel specifically advised the jury during closing argument that he was not relying on diminished mental capacity due to alcohol intoxication as a defense. Thus, there was no evidence to support giving the instruction, and it was misleading to the jury and served to mandate that they ignore all evidence of his intoxication for ANY reason including those outlined in this paragraph. In *United States v. Lavallie*, 666 F. 2d 1217 (8th Cir. 1981), the federal appellate court reversed defendant's conviction, holding that it was error to give the instruction that intoxication was not a defense to the crime charged. The instruction could not be justified as cautionary or relevant and was held to be irrelevant and prejudicial. Similarly, here, the instruction was not supported by the evidence and ought not to have been given.

Secondly, defendant objected because {45-2-203, M.C.A. is unconstitutional in that it has the effect of negating the requirement that the state prove a mental state when proving deliberate homicide where the defendant is voluntarily intoxicated. There are no cases construing this statute since it was amended in 1987. Defendant argued that the 1987 amendment had the effect of eliminating the mental state requirement, in violation of the mandate of *Morisette v. United States*, 342 U.S. 246 (1951). See also {45-2-103, M.C.A., requiring that the defendant have a mental state as defined in the statutes, i.e., here, purposely or knowingly.

The objectionable instruction requires the jury to convict a voluntarily intoxicated defendant without finding

that he had the required mental state which would be required of a sober defendant. As such, voluntary intoxication is substituted for the mental element, which is constitutionally impermissible.

As was stated in *Sandstrom v. Montana*, 442 U.S. 510 (1978), a statute which shifts the burden of proof on the element of mental state to the defendant is unconstitutional. There, the following instruction was disapproved: "The law presumes that a person intends the ordinary consequences of his voluntary acts." In that case, the defendant at least had the opportunity to rebut the presumption, but that was not enough to avoid the constitutional infimity. In this case, there is no such rebuttal available to a defendant, and must [sic] there is no such rebuttal available to a defendant, and must of necessity fail as did the instruction in *Sandstrom*.

For the foregoing reasons, defendant is entitled to a new trial on both counts of deliberate homicide.

Respectfully submitted this 7th day of May, 1993.

/s/ Ann C. German
Ann C. German

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 7th day of May, I mailed a true copy of the foregoing Motion for New Trial to the office of the Lincoln County Attorney, Libby, Montana 59923.

/s/ Ann C. German

MONTANA NINETEENTH JUDICIAL
DISTRICT COURT, LINCOLN COUNTY

THE STATE OF MONTANA, Plaintiff, vs. JAMES ALLEN EGELHOFF, Defendant.	)	DC-92-60 STATE'S BRIEF IN OPPOSITION OF MOTION FOR NEW TRIAL (Filed May 25, 1993)

Defendant has filed a Motion for New Trial. Defendant sets forth three separate grounds upon which he bases his motion for a new trial. The State opposes the motion for all three grounds.

1. Defendant claims there is not substantial credible evidence upon which a jury could have found the Defendant guilty. The State opposes this claim.

The standard of review on the question of sufficiency of evidence to support a jury verdict is set forth in *State v. Cornell*, 220 Mont 433, 434-5, 715 P2d 446 (1986). *Cornell* states:

> "The standard of review in a jury verdict in a criminal case is 'whether there is substantial evidence to support a conviction, viewed in a light most favorable to the State. (citations omitted). [sic]

Substantial evidence is defined as:

> "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Spurlock*, 220 Mont 238, 241, 731 P2d 1515 (1987); *Cornell*, 220 Mont at 435.

There is more than sufficient evidence upon which to base a verdict of guilty for each count. Defendant in essence reargues his case in his motion, citing to the points Defendant thinks are appropriate. Defendant ignores the evidence upon which a verdict could be and was based.

There are many factors that point to the Defendant being the murderer. The victims and Defendant got into a car in Troy. Defendant was in the back seat of the car. The three individuals drove away. The same vehicle was seen later coming to a rest after crashing into a ditch. No one exited the car or had an opportunity to exit the car. The two victims were in the car, shot once each in the head. The bullet wounds were consistent with the victims having been shot from behind. The Defendant was in the car. Defendant's gun was in the car. Two empty shell casings were in Defendant's gun.

A bullet was recovered from one of the victims. The bullet matched all the characteristics of a bullet from Defendant's gun, with exception that the rifling of the bullet was destroyed. There were powder residues on Defendant's hand consistent with firing a gun. There was blood from the victims on the Defendant. It would have been virtually impossible for any fourth person being in the car to have exited the car without being seen after the car came to a rest. No person or individual saw a fourth person in the car.

The car was observed in the ditch to the highway several times some distance from where it finally came to rest. No more than three people were ever observed in the car. One time when the car was in the ditch on

Highway 2, an individual in the back of the car was screaming at the people who had stopped not to approach the car. At that point, it appeared that the driver and the person in the back were alive and a person on the passenger side of the front side was injured. This evidence is consistent with evidence that one of the victims was shot some distance back on the old US Highway 2.

A reasonable person can use these facts and the other facts presented at trial to determine that the Defendant was the person who shot the two victims. A reasonable person could easily reject the evidence argued by Defendant. It is not the function of the Court to second guess the jury on which evidence the jury chose to believe. Viewed in a light most favorable to the State, there is more than sufficient evidence upon which to base a verdict of guilty.

The State would also point out that a new trial is not an appropriate remedy if there is insufficient evidence. If there is insufficient evidence upon which to support a jury verdict, the remedy is dismissal of the case. *State v. Warren*, 192 Mont 436, 442, 628 P2d 292 (1981).

2. Defendant claims it was reversible error for the trial court to allow Becky Garrison to give an opinion in which the manner in which the offense was committed. The State disagrees with this claim.

Defendant alleges that Becky Garrison was allowed to give her opinion as to the manner in which the offense was committed. This argument mischaracterizes the evidence presented and what Ms. Garrison stated. The evidence in question dealt with a stick that Ms. Garrison

found in the vehicle immediately after the vehicle crashed into the ditch. Ms. Garrison initially thought this item was a muffler pipe or something similar to a muffler. Ms. Garrison left the accident for a period of time to go to the hospital in Libby. She then returned to the scene, found the item in question, identified it as a stick, and delivered the item into the custody of the Sheriff's Office. At trial, she was asked as to what she thought the stick might have been used for. She stated that she thought that an individual might have been driving the vehicle from the back seat, using the stick as an instrument to manipulate some of the vehicle's controls.

This evidence is permissible. Defendant cites no authority that this was impermissible opinion evidence. Defendant cites no authority why this evidence was inappropriate. This evidence was presented by the State as an impression Ms. Garrison had at the time of the crash of the car.

Defendant also complains that Ms. Garrison's testimony was not disclosed to Defendant in pre-trial discovery. Defendant seems to be assuming that there is some obligation for the State to disclose the opinion of this witness. The prosecutor has a constitutional duty to disclose any exculpatory evidence. The prosecutor is not constitutionally required to produce everything that he knows. "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Moore v. Illinois*, 408 US 786, 33 LEd 2d 706, 713, 92 S.Ct. 2562 (1972). *See also U.S. v. Agurs*, 427 US 97, 49 LEd 2d 342, 353, 96 S.Ct. 2395 (1976).

The other requirements for the State to produce discovery are contained in the statute governing discovery, that being Section 46-15-322, M.C.A. A statement is defined in §46-1-202(26), M.C.A. A comment made by a witness, not recorded or written is not a statement. The State provided to the Defendant all materials it had in its possession concerning its case. The State provided all reports of the police officers, all statements of the witnesses, field notes of the police officers, scientific reports, and so forth. All statements, whether written or recorded, were produced.

Defendant seems to be alleging that the State must produce oral comments of a witness to any member of the investigating team even when oral statement is not memorialized in writing or in a report of the officer. The statutes governing discovery do not make [sic] require this kind of production. The State also would point out that Defendant's argument on this point is contradictory to its own behavior in producing testimony from Dr. Clyde Knecht during the trial, such testimony being based on interviews with Dr. Knecht that were not memorialized in any form, according to the defense counsel, and the content of which were not disclosed to the State. In addition, Defendant had full opportunity to interview Ms. Garrison prior to trial. Defendant made no effort to impeach Ms. Garrison's testimony. Defendant did not ask for a continuance to deal with her testimony.

The State does not have any statements in this case that were not produced for the inspection and copying by the Defendant. The argument by Defendant on discovery is without merit.

3. Defendant alleged that the jury ought not to have been instructed that voluntary intoxication is not a defense and may not be taken into consideration in determining the existence of a mental case [sic] which is an element of the offense. The State disagrees with this allegation.

This allegation actually is two arguments lumped under one heading. The Defendant argues first that the instruction is misleading, and second, that the instruction is unconstitutional. At common law, intoxication is not a defense to a criminal charge. *See Hopt v. Utah*, 104 US 631, 26 LEd 873 (1882). "The fact that intoxication is not a defense to a crime is so universally accepted as to not require citation of cases. No court has ever descended from the proposition that voluntary intoxication is not a defense." 8 ALR 3rd 1236, Section 3(a), *See also* 21 AMJUR 2d, Criminal Law, Section 155. An examination of the cases indicates that some jurisdictions with crimes requiring a specific intent will allow intoxication as a defense to the specific intent, without allowing intoxication as a total defense to the charge. Some jurisdictions do not allow intoxication as a defense to mental state or to specific intent. *See* generally 8 ALR 3rd 1236. The State has found no court anywhere that has ruled that a statute providing that voluntary intoxication is not a defense to be unconstitutional.

The next subissue is the appropriateness of the jury instruction from the statutory language of Section 45-2-203, M.C.A. Defendant bases its argument entirely on citation to the *United State* [sic] *v. Lavallie*, 666 F2d 1217 (8th Cir. 1981). In *Lavallie* no evidence was produced to show that the Defendant was intoxicated at the time of

the alleged crime. The only evidence produced was that there had been some drinking. *Lavallie* held that giving of the voluntary intoxication instruction under those facts was error because it was a comment on the character of the Defendant. *Lavallie* also cites to *U.S. v. Hanson*, 618 F2d 1261 (8th Cir. 1980). (*Hanson* stated that intoxication is not a defense to a general intent crime.)

Lavallie is easily distinguishable from this case. While Defendant now argues that intoxication was not a defense, Defendant did list intoxication as one of his defenses to the charge. In this case, the defense went to great lengths to show that the Defendant was intoxicated to the point that he was passing out. Defendant put into evidence blood alcohol levels of the Defendant. Defendant called a witness to testify that Defendant was extremely intoxicated. When there is clear and convincing evidence that the Defendant was intoxicated, and when that evidence is produced in whole or in part by the questions from the Defendant, it clearly can not be an error to instruct the jury as to how the jury may weigh the evidence of intoxication. It is not an error to instruct the jury on the law that applies to the case. With evidence being produced by Defendant that the Defendant was intoxicated, the State is entitled to have the jury told that intoxication is not a defense.

Defendant also argues that this instruction may have mislead the jury to totally disregard evidence of intoxication and to ignore the evidentiary value that the Defendant purportedly was placing on the intoxication evidence. Defendant did not ask for an instruction advising the jury that the jury could consider intoxication for the purposes which the defense now advocates in his

motion. Since the Defendant did not ask for such an instruction, he cannot complain about the correct instructions that the State did present. In addition, the Defendant fully and completely argued his theory to the jury and the State did not argue to the jury that there was no law backing what Defendant argued. Defendant was not prevented from presenting his theory of the case to the jury.

The motion to grant a new trial should be dismissed.

Respectfully submitted this 25th day of May, 1993.

/s/ Scott Spencer
SCOTT B. SPENCER
County Attorney

CERTIFICATE OF SERVICE

I, Debra S. Kambel, a Secretary in the Office of the Lincoln County Attorney, do herewith certify that on the 25 day of May, 1993, a copy of the foregoing State's Response to Motion for New Trial, was served upon the above named Defendant by delivering said copies to:

Ann German
418 Mineral Avenue
Libby, MT 59923

Amy N. Guth
418 Mineral Avenue
Libby, MT 59923

/s/ Debra S. Kambel
Debra S. Kambel

ROBERT S. KELLER
District Judge
Lincoln County Courthouse
Libby, Montana 59923

MONTANA NINETEENTH
JUDICIAL DISTRICT COURT, LINCOLN COUNTY

STATE OF MONTANA Plaintiff, -vs- JAMES ALLEN EGELHOFF Defendant.	No. DC-92-60 **ORDER** (Filed June 18, 1993)

The Defendant's Motion For New Trial came on for hearing on June 14, 1993. At the time of the hearing the Court denied the Defendant's motion on all grounds except the Defendant's assertion that Instruction No. 11 violated the Defendant's constitutional rights, which argument the Court wanted to give further consideration. The Court has considered the arguments of Counsel and the briefs submitted and the matter is now ready for ruling.

IT IS HEREBY ORDERED that the Defendant's Motion For New Trial is ***Denied*** and the sentence imposed by the Court on June 14, 1993, should be carried out.

DATED June 17, 1993.

/s/ Robert S. Keller
ROBERT S. KELLER
District Judge

MEMORANDUM

The Defendant objected to Instruction No. 11, which was taken verbatim from §45-2-203 MCA. The statute is as follows:

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed [,smoked, sniffed, injected, or otherwise ingested] the substance causing the condition. (the bracketed portion was omitted from the Instruction)

In this regard the Defendant had made three contentions: (1) The instruction should not have been given, because it was prejudicial. *U.S. v. Lavallie,* (8th Cir. 1981) 666 F.2d 1217. (2) The instruction eliminates the mental state requirement. *Morissette v. U.S.,* 342 U.S. 246, 96 L.Ed. 288 (1952). (3) The instruction shifts the burden of proof and is therefore unconstitutional. *Sandstrom v. Montana,* 442 U.S. 510, 61 L.Ed. 2d 39 (1979).

The Defendant contends that the giving of the voluntary intoxication instruction was prejudicial because it mandated the jury to disregard the evidence that the defendant was intoxicated. Evidence of intoxication was introduced for the purpose of showing that the Defendant couldn't have driven the car and for the purpose of explaining his inability to remember. The Defendant asserts that because he told the jury that he was not

relying on intoxication to avoid responsibility, the instruction should not have been given. The Defendant's reliance on the *Lavallie* case is misplaced. In that case the Court held that the giving of a voluntary intoxication instruction was prejudicial because intoxication was not claimed as a defense and no evidence was introduced to show that the Defendant was intoxicated at the time of the alleged criminal act. The Court stated:

> In a proper case, an intoxication instruction should be required even without a request where sufficient evidence of intoxication was introduced. [citations omitted] 666 F.2d 1217, 1219.

In the case at bar there was substantial evidence introduced by the Defendant concerning the Defendant's level of intoxication. Telling the jury that an intoxicated condition is not a defense, is not the same as telling the jury that it must disregard the Defendant's explanation of his actions.

The Defendant contends that the instruction in question eliminated the mental state requirement. The Defendant implies that the instruction permitted the Defendant to be found guilty without finding that he acted "purposely or knowingly". In the *Morissette* case the defendant was charged with willfully and knowingly converting property of the U.S. The trial court refused to permit the Defendant to argue to the jury that he acted without criminal intent, i.e. that he thought the property was abandoned. The trial court said that the intent was presumed from the criminal act. The Supreme Court reversed holding that where intent is an element of the crime, it must be submitted to the jury. The Court further

stated that the trial count [sic] could not raise a presumption of intent from an act. Such a presumption would conflict with the presumption of innocence.

Instructions No. 13 and 14 charged the jury with the elements of the crime, including the element of intent, "purposely or knowingly." Instruction No. 11 didn't instruct the jury to disregard Instructions No. 13 and 14. Read together the instructions are entirely comprehensible. The jury was still required to determine that the Defendant committed the acts "purposely or knowingly". The language of the statute is very clear: one is still criminally responsible for his conduct even though intoxicated; intoxication is not a defense; and intoxication is not to be considered in determining the existence of a mental state. The language doesn't suggest that the jury should disregard the Court's other instructions.

The final contention of the Defendant is that the offending instruction shifted the burden of proof on the element of intent to the Defendant. The *Sandstrom* case relied upon by the Defendant is a Montana case in which the Defendant was convicted of deliberate homicide. The defendant contended that he didn't act "purposely or knowingly" and was therefore guilty of a lesser crime. The jury was instructed that the law presumed that a person intends the ordinary consequences of his voluntary act. The Court held that the jury may have found that the presumption was either conclusive or shifted the burden of proof and was therefore a violation of due process. Here, the Defendant contends that the instruction permits the jury to convict him without finding that he had the required mental state of a sober person. The

Defendant contends that voluntary intoxication is substituted for "purposely or knowingly". The argument is a *non sequitur*. Apart from the fact that the jury was instructed to read all of the instructions as a whole and to regard each in the light of all instructions, the plain intent of the instruction is that the jury not take into consideration the defendant's intoxication when determining if he acted "purposely or knowingly". The instruction doesn't say that an intoxicated person is criminally responsible for his conduct and therefore the jury should disregard determining if he acted with the required intent. The statute clearly states the proposition that an intoxicated person is to be judged by the same standard as a sober person for the purpose of determining intent. The burden of proof was [sic] not been modified. In *Sandstrom* terms the instruction did not create a presumption which would direct the jury to come to a certain result or shift the burden in any way to the Defendant.

pc: Scott B. Spencer, Esq.
Ann C. German, Esq.
6-18-93

MONTANA NINETEENTH JUDICIAL DISTRICT,
LINCOLN COUNTY

THE STATE OF MONTANA, Plaintiff, vs. JAMES ALLEN EGELHOFF, Defendant.	)	No. DC-92-60 JUDGMENT PRISON TERM (Filed June 18, 1993)

The County Attorney of Lincoln County, Montana, having filed an Information charging the offenses of **DELIBERATE HOMICIDE,** two counts, felonies, the Defendant having been found guilty on April 7, 1993, after a trial by jury of the charges of **DELIBERATE HOMICIDE,** two counts, felonies, and the Court having conducted a hearing in aggravation or mitigation of sentence and for pronouncement [of] judgment, such hearing having been held the 14th day of June, 1993.

THE COURT HEREBY ORDERS, ADJUDGES, AND DECREES that the Defendant be and hereby sentenced to a term of 40 years in the Montana State Prison at Deer Lodge, Montana, on each count. Pursuant to §46-18-221, M.C.A., Defendant is sentenced to a term of two years in Montana State Prison on each count for using a firearm in the commission of each offense. All sentences shall run consecutive to each other. The total length of the period of incarceration is 84 years. Defendant is designated dangerous for purposes of parole eligibility.

Defendant shall be given credit as of June 14, 1993, for 366 days of prior incarceration.

The reasons for the sentence are attached as Exhibit A.

Dated this 14th day of June, 1993.

Signed this 18th day of June, 1993.

/s/ Robert S. Keller
Robert S. Keller
District Judge

Copies: Spencer
German
Guth
Sheriff
Adult P&P
Defendant
MT State Prison (cert.)
State Board of Pardons (cert.)
Clerk & Recorder
6-18-93 np

MONTANA NINETEENTH JUDICIAL DISTRICT COURT
LINCOLN COUNTY

THE STATE OF MONTANA, Plaintiff, vs. JAMES ALLEN EGLEHOFF, Defendant.	CAUSE NO. DC 92-60 BEFORE JUDGE KELLER

Taken in the Lincoln County Court House
Libby, Montana
Monday, June 14, 1993 – 9:30 A. M.

APPEARANCES

SCOTT B. SPENCER, ESQ., Lincoln County Attorney, 512 California Avenue, Libby, Montana 59923,
appearing on behalf of the Plaintiff.

ANN C. GERMAN, ESQ., and AMY N. GUTH, ESQ., Lincoln County Public Defenders, 418 Mineral Avenue, Libby, Montana 59923,
appearing on behalf of the Defendant.

PARTIAL TRANSCRIPT OF PROCEEDINGS

Reported by Carroll B. Copeland, CSR, RPR,
Official-Freelance Court Reporter

[p. 2] THE COURT: Is there any reason why sentence ought not now be pronounced?

MISS GERMAN: No.

THE COURT: Very well then. It is the sentence of this Court that you be imprisoned in the Montana State Prison for a period of 40 years and that sentence be enhanced for the use of a firearm by two years for a total of 42 years on each count to be served consecutively.

And I gave this a lot of thought at the time of trial. And the evidence all points to shooting of Roberta much sooner than shooting of the other. And I understood the position of the defendant at the time of trial. And that as a result of the alcohol you didn't have a memory of what occurred. But that really doesn't do a whole lot for the general public. And I don't know that you aren't going to do this again.

We don't know anything about what caused you to do this on the basis of what you have given to us. And there is nothing in the evidence to suggest that there was any difficulty between you and the deceased people or at least no basis for any difficulty.

[p. 3] And the reason for the sentence is just simply that, protection of the public. The crime itself, of course, is egregious but we have a lot of egregious crimes. And in this particular case, I don't know what else we can do to protect the public other than to make it a lengthy sentence. And that is the reason for it.

And you are remanded to the custody of the Sheriff but you are not to be transported until I come up with a, have given an opinion on this constitutionality on the statute that is involved. And I am going to do that this week.

MR. SPENCER: Your Honor, two questions. I assume credit for time served is ordered?

THE COURT: Oh, yes.

MR. SPENCER: And the parole eligibility designation is dangerous or not?

THE COURT: No, it is dangerous. That is the reason for the sentence.

MR. SPENCER: I wanted to make sure. Thank you.

THE COURT: Very well.

(End of Transcript)

[p. 4] CERTIFICATE

STATE OF MONTANA)
: ss.
County of Lincoln)

I, Carroll B. Copeland, CSR, RPR, Official-Freelance Court Reporter and Notary Public, State of Montana, residing in Libby, Montana, do hereby certify:

That I was duly authorized to and did report the testimony and proceedings in the above-entitled cause;

That the foregoing pages of this transcript represent a true and accurate transcription of my stenographic notes.

IN WITNESS WHEREOF I have hereunto set my hand this the 15th day of June, 1993.

/s/ Carroll B. Copeland
Carroll B. Copeland, CSR, RPR
Official-Freelance Court Reporter

* * *

[p. 1158] objection.

Do you want to make an objection for the record?

MISS GERMAN: I want to object to State's Instruction number 10 on the ground that the theory of this case has not been a defense, has not raised the defense of intoxication as a mitigating factor or otherwise with respect to the offenses charged. And therefore, I believe that it is prejudicial error to instruct the jury that voluntary intoxication is not a defense because it has not been raised by the defense in our case.

The second reason would be that with respect to the statute, that is statute 45-2-203, it is your, under the constitution, you are shifting the burden from the state to the defendant with respect to the mens rea required by selecting out cases where there is a person that is intoxicated and lowering the mental state in those cases compared to other cases.

There is a case that I have, Judge, called Morisette versus United States which is a U. S. Supreme Court case, 1952. And it is a landmark case addressing the requirements that the state has the burden of proving mens rea or state [p. 1159] of mind in a case like this, kind of state of mind, purposeful or knowingly.

And we believe that it is an unconstitutional shift of the burden to the defendant to have to prove, well, what would be required would be proving the intoxication was involuntary in order for it to be considered by the jury in determining mental state.

And I would like to have the record state that we have searched for any cases in which the statute was considered by the Montana Supreme Court since its amendment in 1987. We have found none. And we believe the statute is unconstitutional and would be held to be so by the Supreme Court for these reasons.

THE COURT: It will be given.

And then we have the Defendant's one and two.

MR. SPENCER: And I have no objection to either one.

THE COURT: And the state's form of verdict. Here it is.

MISS GERMAN: Yes. I want to just –

THE COURT: I called counsel for Court's number one and two that I requested for

* * *